STREAM Periodic Country Report: Sweden

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Introduction

Council Framework Decision (2002/584/JHA) of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States was transposed into Swedish law through a number of legislative instruments, the most important of which for the purpose of this country report are Act (2003:1156) on the surrender from Sweden pursuant to a European arrest warrant (*lagen om överlämnande från Sverige enligt en europeisk arresteringsorder*, hereafter 'EAW Act') enacted by Parliament, and Ordinance (2003:1178) on the surrender to Sweden pursuant to a European arrest warrant (*förordningen om överlämnande till Sverige enligt en europeisk arresteringsorder*), enacted by the Government. Both legal instruments entered into force on 1 January 2004 and will be dealt with in this report.

A short remark may be made about the different aids used in Sweden to interpret statutory law in accordance with traditional legal method.

For the interpretation of the domestic law on the European arrest warrant the preliminary work plays a very important role. The preliminary work often contains more detailed explanation of terms used than is possible in a statute and illustrative examples are often given to further clarify meanings of words used in the statutory text. For the transposition of an EU framework decision there will be an account of how the Swedish legislation will achieve the result envisaged in the framework decision, and in cases where options are available to the Member States, the preliminary work will also explain why Sweden has or has not adopted a specific option. This important role of preliminary work is not restricted to the implementation of EU legislation and statements in such work are treated as a source of law (subject to the principle of legality).

Swedish case law is used to interpret the statutory text and precedents of the Supreme Court are almost always followed by the inferior courts even though decisions of the Supreme Court are not formally binding on other courts. Supreme Court precedents are published electronically at that Court's website and in annual printed volumes. Decisions of the district courts and courts of appeal can be obtained at the courts and through paid databases for legal professionals. More will be said below on the study of judicial decisions for the purpose of this country report. Obviously, the case law of both the CJEU and the European Court of Human Rights are highly relevant due to the supremacy of EU law and the fact that the European Convention on Human Rights (ECHR) has been incorporated

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into the Swedish legal system as Swedish law. EU and ECHR case law serve not only as aid for interpretation of Swedish statutes but sometimes they function as an independent source of law.

There is no case law on the decisions by Swedish prosecutors to *issue* European arrest warrants for the surrender of suspect or sentenced persons to Sweden. This is due to the fact that there is no appeal procedure with regard to the decision on the issue of a European arrest warrant, as such,[1] which limits to a great extent the availability of case law with Swedish authorities *qua* issuing judicial authority. However, since the decision of a Swedish prosecutor to issue a European arrest warrant for the purpose of conducting a criminal investigation or for prosecution must be based on a Swedish court order to remand the suspect into custody, the European arrest warrant can be challenged indirectly by means of appeal against the underlying order of remand into custody. Decisions on these orders may be difficult to obtain even with the use of paid databases since remand into custody is an interim measure and custody decisions are not readily searchable final decisions. There are also some discrepancies as to the results returned using the two different paid databases 'Infotorg from Bisnode' and 'JP Infonet'. All these factors mean that it is not meaningful to carry out a *quantitative* analysis of the cases.

Case law exists, on the other hand, on the *execution* of European arrest warrants as the decision to surrender a person from Sweden is always made by a court. As mentioned above, decisions of the district courts and courts of appeal are available through paid databases. However, decisions concerning European arrest warrants are not designated under a separate category and the only way to identify decisions involving European arrest warrants is through a free text search. The result of such a search would be over-inclusive as it will also return all cases in which a defendant is tried after being surrendered to Sweden, and indeed all cases in which the European arrest warrant is mentioned in one way or another. But even after filtering the result to include only cases on the execution of incoming European arrest warrants it is not possible either to see which decisions are final decisions on the question of surrender and which are merely interim decisions (such as a decision to appoint a legal counsel, decisions on coercive measures or decisions to request a preliminary ruling from the CJEU). It would take disproportionate effort simply to sort out the final decisions just to get a picture of how the system is working. When the system of surrender between EU Member States was first introduced, some statistics on incoming and outgoing European arrest warrants were kept at the Ministry of Justice and reported to the Commission;[2] figures from the latest years are unfortunately not available.

Neither is a *qualitative* analysis of the inferior courts a meaningful exercise. Decisions of the district courts are in the vast majority of the cases extremely brief, similarly worded and simply stating that the formal criteria for surrender are fulfilled. To the extent that the requested person's arguments are mentioned at all, they are often dismissed summarily (in many cases for good reasons, it may be added). In the databases the actual European arrest warrant is usually not appended to the court's final decision on the matter; in some cases it is even impossible to tell from the decision for what offences the surrender is being requested. Decisions of the courts

[1] The situation can be compared to the forwarding of a judgment to another Member State for the purpose of enforcing a Swedish custodial sentence in that State pursuant to Council framework decision 2008/909/JHA, which follows a different procedure. Unlike the case with the prosecutor's decision to issue a European arrest warrant, the Swedish authority's decisions to forward a judgment to another Member State, as such, are regularly challenged using the appeal procedure.

[2] For these statistics see Wong (2011).

of appeal may contain more extensive reasoning but it is not uncommon either, that the decision of the court of appeal merely states that the court of appeal finds no reason to alter the decision of the district court.

This country report will therefore concentrate on the very few cases dealing directly with the European arrest warrant that have been taken up by the Supreme Court[3] and published in the annual volume *Nytt Juridiskt Arkiv*[4] (Law Report of the Supreme Court). All of these cases have concerned the interpretation of the framework decision involving issues of fundamental rights. The presentation of these cases will illustrate the structure of decision-making in a European arrest warrant proceeding in accordance with the Swedish legislation transposing the framework decision. It is the belief of the present author that a close analysis of the legal argumentation in these Supreme Court decisions would best serve the purposes of the Stream project. The following cases will be analyzed in this country report:[5]

Year	Case report	Issuing Member State	Purpose of surrender	Main outcome
2020	NJA 2020 s. 430	Romania	Enforcement	No breach of Article 3 ECHR; no breach of Article 4 CFR
2009	NJA 2009 s. 350	Poland	Enforcement	No breach of Article. 6 ECHR
2007	NJA 2007 s. 168	Poland	Prosecution	No breach of Articles 6 and 7 ECHR; UN Convention on the Right of the Child not applicable under Swedish law
2005	NJA 2005 s. 897	Finland	Enforcement	No breach of Articles 5 and 6 ECHR

In addition to the above cases on surrender from Sweden pursuant to a European arrest warrant, the following decision of the Supreme Court also deserves to be analysed in this report even though it technically is not a decision on the European arrest warrant, but one on the continued validity of a domestic order for remand into custody. In NJA 2015 s. 261, the decisions of the district court and the court of appeal allowing extension of the period of custody are challenged on the basis of alleged breach of the provision on freedom of movement according to the ECHR. The Supreme Court discusses the principle of proportionality in this context

[3] Not included in this country report are cases at the Supreme Court that may touch upon the European arrest warrant tangentially but where the key question is on quite different matters, e.g. NJA 2015 s. 1053 on the State's responsibility to pay damages for deprivation of liberty when a European arrest warrant is not enforced. Other cases may be simply technical, e.g. Supreme Court (27.5.2021) on removal of the case following the withdrawal of the European arrest warrant by the issuing judicial authority, NJA 2012 not 10 on certain aspects concerning the guarantee to return a national to the executing Member State or Supreme Court (22.11.2016) in which the case is referred back to the district court after clarification of the content of the law by the issuing judicial authority. The low number of cases heard by the Supreme Court can also be explained by the fact that leave of appeal is required for appeals from the district court to the court of appeal as well as from the court of appeal to the Supreme Court. The Supreme Court will take up a case only if it is considered to have precedential value.

[4] Cases deemed to be of precedential value are chosen by the justices of the Supreme Court to be reported in full in *Nytt Juridiskt Arkiv*. References to such fully reported cases are given in the canonical form NJA [year] s. [first page of the report].

[5] After the completion of this report, the Supreme Court rendered a significant decision refusing the surrender of a person to Greece for the purpose of execution of sentence, the 'Greek *in absentia* judgment case': decision of 13.12.2022 in case B 4080-2 (abbreviated as *Greek in ab.* in the following).This decision deals with some very central issues concerning both questions already discussed in this report and new questions on the responsibilities of the executing Member State. A separate section is added dealing with *Greek in ab.* and where relevant comments will be added in the text to reflect the current state of law.

and finds that there is no breach of the ECHR. As the custody decisions form the basis of a European arrest order issued by a Swedish prosecutor, NJA 2015 s. 261 is therefore highly relevant for the present study.

There is no comprehensive and in-depth academic treatment of the subject of surrender pursuant to a European arrest warrant. Academics with an interest in this area tend to contribute instead more generally to EU criminal law rather than the peculiarities of Swedish law. One publication written by practitioners is, however, of great importance for the dissemination of knowledge on this topic among practitioners who may not be too familiar with EU criminal law. The publication referred to here is the commentary *Överlämnande enligt en europeisk eller nordisk arresteringsorder – En kommentar* (Stockholm: Norstedts, first published in print 2018 and currently digital version 12.12.2022) by Håkan Friman, Ulf Wallentheim and Joakim Zetterstedt. This commentary provides the necessary background for a practitioner who has to apply the law through presentation and clarification of the underlying framework decision, the preliminary work behind the Swedish legislation as well as relevant case law from the CJEU and the European Court of Human Rights. As examples of different problems that may arise (not all having to do with human rights) there are also frequent references to cases from the courts of appeal in Sweden. However, in this country report, references to this commentary are given only when a specific point is raised there; in other cases, references are given to the primary sources rather than to the commentary.

This country report assumes that its readers are already somewhat familiar with the framework decision on surrender pursuant to a European arrest warrant and will not use the available space to explain the provisions of the framework decision. Instead the report will focus on the application of the system of surrender under Swedish law in areas of particular interest for mutual recognition/trust and an efficient system of European arrest warrants.

Section I – Issuing of EAWs: rule of law and fundamental rights considerations

A public prosecutor (*allmän åklagare*), i.e. not the Prosecution Authority (*Åklagarmyndigheten*) as such but the prosecutor as an individual, is authorized to issue a European arrest warrant both for the purpose of a criminal investigation/prosecution[6] and for the purpose of enforcement of sentence.

This was, however, not the case when the system with European arrest warrants was initially implemented in 2004. In the original version of *Ordinance (2003:1178) on surrender to Sweden pursuant to a European arrest warrant* the public prosecutor was only authorized to issue a European arrest warrant for the purpose of criminal investigation/prosecution,[7] as the National Police Board (*Rikspolisstyrelsen*) was tasked with issuing European arrest warrants for the purpose of enforcement of sentences.[8] This is in line with the Swedish conception of enforcement as an administrative rather than a judicial matter. This order had been in operation for more than a decade without any challenge until Rechtbank Amsterdam, in a request for a preliminary ruling by the CJEU, raised the question whether the National Police Board in Sweden could be considered a 'judicial authority'. In *Poltorak*,[9] a European arrest warrant was issued by the Swedish National Police Board for the surrender of Mr Poltorak from the Netherlands for the purpose of enforcement of a custodial sentence. In its ruling, the CJEU clearly stated that the term 'judicial authority' in the FD-EAW had to be given an "autonomous and uniform interpretation" throughout the EU[10] and the police service could not be covered by that term[11]. The Swedish Government had made the observation that the National Police Board was merely administering the enforcement of a sentence handed down by a court, which undeniably was a judicial authority. The CJEU recognized that the FD-EAW itself would permit a "recourse to a non-judicial authority … as regards the transmission and reception of European arrest warrants", e.g. a central authority[12], provided that action by such a non-judicial authority was "limited to practical and administrative assistance for the competent judicial authorities"[13]. According to *Poltorak*, it is clear, however, that the National Police Board was not simply assisting the court in issuing a European arrest warrant to enforce the sentence. The decision to issue a European arrest warrant was an entirely separate decision from the criminal sentence handed down by the court and that decision was not subject to review by a court or another judicial authority. Furthermore, the National Police Board had issued the arrest warrant at the request of the Prison and Probation Service (*Kriminalvården*), not at the request of the court. Having regard to the objectives pursued by the system of surrender, the CJEU concluded that

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6 It may be pointed out that under Swedish law a formal decision to prosecute can only be made when the prosecutor is satisfied that the evidence is so strong that a conviction is expected. This means that virtually all outgoing European arrest warrant from Sweden are issued for the purpose of investigation. As it is normally not possible to hold trials *in absentia* for the kind of offences for which a European arrest warrant can be issued, it is the practice of the Swedish prosecutors not to bring formal prosecution through an indictment before the suspect is present in Sweden after a surrender.

7 3 § of Ordinance 2003:1178 (original version)

8 4 § of Ordinance 2003:1178 (original version)

9 Case C-452/16 PPU *Poltorak*, judgment of 10 November 2016, EU:C:2016:858

10 *Poltorak*, para. 32

11 *Poltorak*, para. 34

12 *Poltorak*, para. 41

13 *Poltorak*, para. 42

> … the issue of an arrest warrant by a non-judicial authority, such as a police service, does not provide the executing judicial authority with an assurance that the issue of that European arrest warrant has undergone such judicial approval and cannot, therefore, suffice to justify the high level of confidence between the Member States …, which forms the very basis of the Framework Decision.[14]

It may be added that facts pertaining to the specific organizational structure of polices services within the executive, and the degree of autonomy they might have, are irrelevant.[15]

Shortly after the CJEU's decision in *Poltorak*, the aforementioned Ordinance 2003:1178 was amended so that only public prosecutors are authorized to issue European arrest warrants, both for the purpose of criminal investigation/prosecution and for the purpose of enforcement of sentence.[16] The substitution of the police by a public prosecutor appears to have remedied the defect in the Swedish order pointed out in *Poltorak*; no further domestic discussion has ensued on the question whether moving the responsibility for the issuing of European arrest warrants for the purpose of enforcement to the public prosecutor alone is sufficient to address the question of judicial control raised in *Poltorak*. A closer analysis of the Swedish order reveals, however, that some problems remain (and Sweden may not be the only country facing such problems). To discuss these problems, it is necessary to present the Swedish rules governing the issue of European arrest warrants.

As mentioned above, the public prosecutor is now (i.e. after the amendment in Ordinance 2003:1178) the only competent authority for issuing European arrest warrants. All public prosecutors are competent to issue European arrest warrants, but arrest warrants for the purpose of enforcement of custodial sentence are dealt with by the National Unit for International and Organized Crimes (*Riksenheten mot internationell och organiserad brottslighet, RIO*) within the Prosecution Authority.[17] For the purpose of enforcement of sentence, a European arrest warrant may be issued at the request of the Prison and Probation Service for the enforcement of prison sentences, by the National Board of Health and Welfare (*Socialstyrelsen*) for the enforcement of forensic psychiatric care orders (*rättspsykiatrisk vård*) or by the National Board of Institutional Care (*Statens institutionsstyrelse*) for the enforcement of 'secure youth care' (*sluten ungdomsvård*) for offenders up to eighteen years of age. All three of these authorities are administrative authorities and not judicial authorities. The decisions made within these authorities requesting the public prosecutor to issue a European arrest warrant are administrative decisions not subject to judicial overview.

When deciding whether to issue a European arrest warrant, the public prosecutor shall determine whether the requirement of proportionality pursuant to Sec. 5 Ordinance 2003:1178 is met. This proportionality assessment is applicable both for cases of criminal investigation/prosecution and cases of enforcement of sentence. This statutory requirement reads as follows (author's own translation):

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14 *Poltorak*, para. 45

15 Ibid.

16 Ordinance 2016:1142 amending, *inter alia*, 3 and 4 §§ of Ordinance 2003:1178

17 1:3 and 4:8 of the Regulation 2007:12 of the Prosecution Authority, as amended by Regulation 2018:4

> A Swedish arrest warrant may be issued only if, having regard to the harm to the individual as well as the delay and costs expected to be incurred in the case, a request for surrender to Sweden is justified considering the character and seriousness of the offence in question and other circumstances.
>
> If the person requested is under eighteen years of age, an arrest warrant may be issued only if it concerns a serious offence, if the young person has a strong tie to Sweden, or if there are otherwise special reasons for requesting the surrender to Sweden.

The public prosecutor must therefore undertake an assessment based on the general criteria set out in the ordinance. A few remarks concerning specific aspects of proportionality have been made in a legal commentary on the ordinance written by practitioners,[18] where reference is also made to the Commission's Handbook[19] on the European arrest warrant. The aspects mentioned in the commentary include the likelihood that consent be given to the surrender, what is known about the time that it usually takes to complete the surrender procedure in a particular Member State, and whether the delay in the surrender procedure would adversely affect ongoing prosecutions in Sweden against other co-defendants.[20] The commentary also suggests that alternatives to the surrender procedure should be considered, e.g. the transfer of proceeding or the transfer of custodial sentence to the other Member State.[21] With respect to the character and seriousness of the offence, a reason for issuing a European arrest warrant for the purpose of enforcement of sentence – not mentioned in the commentary – is that public interest, especially in high-profile cases, may justify that the custodial sentence is actually served in Sweden and not anywhere else. Other than that, there is little guidance for the public prosecutor on the assessment of proportionality.

The public prosecutor's decision whether to issue a European arrest warrant is not subject to judicial remedies. Decisions of this kind cannot be the subject of appeal to a court.[22] Even though a request can be made for reconsideration or for review by a superior public prosecutor,[23] such requests are only meaningful in cases where the public prosecutor has decided *not to issue* a European arrest warrant.[24] This means that the possibility of review serves practically only State interests and not the interests of the person who is the subject of surrender. A potential safeguard, not used in the present context, is the review by the Parliamentary Ombudsman (*Justitieombudsmannen, JO*). The Ombudsman has the power to review the conduct of officials, such as the police and public prosecutors. This review power is regularly exercised, and a considerable part of the work of the Ombudsman is the investigation of complaints about the use of different investigative and coercive measures (such as searches, seizure and arrest), where proportionality considerations often come into question. However, this avenue of redress or control for disproportionate use of the European arrest warrant has not been used in practice.

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18 Friman, Wallentheim & Zetterstedt (2021), under IV.4

19 European Commission (2017), especially 2.4

20 Friman, Wallentheim & Zetterstedt (2021), under IV.4.1

21 Ibid.

22 The fact that such decisions cannot be appealed to the courts also means that will be no case law on the interpretation of the proportionality requirement to guide the public prosecutors' application of the law.

23 See Wong (2022), 190.

24 This situation may arise when a victim of crime is not satisfied with the prosecutor's decision not to issue a European arrest warrant, which has the practical consequence that the alleged offender will not be prosecuted before a Swedish court. The refusal to issue a European arrest warrant is usually accompanied by a decision to discontinue the investigation.

The situation with respect to the issuing of European arrest warrants for the purpose of enforcement of sentence can be summarized thus as follows: Neither the decision of the administrative authorities to request the issue of a European arrest warrant nor the public prosecutor's decision to issue such warrants is subject to judicial recourse. Whether this order of things satisfies the requirement of judicial control in the issuing Member State is a legitimate question to pose. While *Poltorak* is quite clear that the police cannot be a judicial authority, the status of Swedish prosecutors is never questioned. But against the background that no judicial remedy exists against a Swedish public prosecutor's decision to issue a European arrest warrant as such, the requirement of judicial control is met only if the function carried out by the public prosecutor is indeed a judicial one, and this is an open question. Some answers can be given after considering the CJEU's decision in *XD*;[25] but before looking at that CJEU case it may be interesting to explore an earlier case in which the status of the Swedish public prosecutor as a judicial authority is challenged; this is the *Assange* case[26] concerning a European arrest warrant for the surrender from the United Kingdom (UK) to Sweden for the purpose of criminal investigation.

The competence for issuing a European arrest warrant for the purpose of enforcement of sentence has already been described above. It remains to state the essential requirement for issuing a European arrest warrant for the purpose of criminal investigation/prosecution before looking into the *Assange* case. The basis for the public prosecutor's decision to issue a European arrest warrant is not a national arrest warrant (*anhållningsbeslut*),[27] but a court's decision to remand a suspect in custody (*häktningsbeslut*), to be called 'custody decision' in the following. To issue a European arrest warrant, there must be a *prior court decision* to remand a suspect into custody based on reasonable suspicion (*på sannolika skäl*) for an offence that can lead to imprisonment of one year or longer.[28] In European arrest warrant cases the court's decision is, for obvious reasons, made *in absentia*; but the suspect has the right to be represented by a defence counsel at an oral remand hearing.[29] It is a separate decision, made by the public prosecutor, to issue a European arrest warrant; this is an entirely written procedure, and neither the suspect nor his or her defence counsel participates in this decision-making.

The defendant in *Assange* argued, *inter alia*, that the public prosecutor in Sweden did not perform judicial functions in the sense of independently and impartially adjudicating a legal issue, especially in view of the fact that the prosecutor was him- or herself a party to the main proceeding. The defendant maintained, in essence, that only a court could be competent to issue a European arrest warrant – an argument that was based, to a large extent, on the interpretation of the UK Extradition Act 2003, which implemented the FD-EAW in that (then) Member State. After considering different mainly textual arguments and the legislative history, the majority of the Supreme Court arrived at the conclusion that the term 'judicial authority' was capable of encompassing both courts (judges) and prosecutors. But rather than stopping there the majority brought into

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[25] Case C-625/19 *XD* 'Openbaar Ministerie (Public Prosecutor's Office, Sweden)', judgment of 12 December 2019, EUC:2019:1078

[26] [2012] UKSC 22, *Assange v Swedish Prosecution Authority (Nos 1&2)*, judgment of the Supreme Court of 30 May 2012. Since the United Kingdom had not accepted the jurisdiction of the CJEU in this area of cooperation no request for a preliminary ruling could be made.

[27] The public prosecutor has the power to issue a national arrest warrant; no authorization by a judge/magistrate is required. The Swedish national arrest warrant should thus, in the context of the surrender system, be seen more as a provisional arrest warrant that permits the apprehension and temporary detention of the suspect.

[28] Sec. 3 Ordinance 2003:1178. It is important that the provision includes the qualification 'on reasonable suspicion' as it is possible to order the remand into custody on a lower degree of suspicion. See Wong (2022), 207–208.

[29] The institution of issuing 'sealed' warrants at the request of the prosecutor, without the knowledge of the suspect, is unknown in the Swedish legal system.

consideration the procedure in the issuing Member State as a whole rather than focusing on the actual body that technically was the issuer of the European arrest warrant. The majority made a distinction between the 'antecedent process' foregoing the European arrest warrant and the actual issue of the arrest warrant and summarized the surrender procedure in the issuing Member State as follows:

> Before the EAW was issued there would be an antecedent process that would result in an enforceable judicial decision involving deprivation of liberty. In most, but not necessarily all, Member States this would involve a judge. The Swedish process in the present case … provides a good example of this. The subsequent issue of the EAW would have to be done by a 'judicial authority', but that term embraced both a judge and a prosecutor. The judicial authority in question might or might not be that responsible for the antecedent process.[30]

What is crucial for the protection of fundamental rights, then, is the judicial control exercised by the body making the decision on deprivation of liberty. As the UK Supreme Court put it, "[u]nder the scheme of the Framework Decision the safeguard against the inappropriate issue of an EAW lies in the process antecedent to the issue of the EAW".[31] It is apparent that the majority of the UK Supreme Court found that it sufficed for adequate protection that judicial control by a court be exercised at only one stage of the procedure in the issuing Member State. The case was resolved according to the following logic:

> Under Swedish law the issue of a domestic detention order in absentia was a precondition to the issue of an EAW. That order was issued by a court which, it seems, had to be satisfied that there was sufficient evidence giving rise to probable cause and that *domestic* [emphasis added here] arrest was proportionate. The only possible additional area of discretion so far as the issue of the EAW was concerned would seem to be whether this [i.e. the European arrest warrant] was proportionate. There does not appear to have been a requirement that this should receive judicial consideration.[32]

As suggested by the majority of the UK Supreme Court, there was no explicit requirement of proportionality in the text of the FD-EAW. But even if it were understood implicitly that the issue of European arrest warrants should be governed by the principle of proportionality, proportionality itself was, for the majority of the Supreme Court, a non-justiciable issue, at least not before a court in the executing Member State. This did not hinder the majority, however, to leave the following *obiter dicta*:

> The scheme of the EAW needs to be reconsidered in order to make express provision for consideration of proportionality. It makes sense for that question to be considered as part of the process of issue of the EAW. […] There is a case for making proportionality an express precondition of the issue of an EAW. Should this be done, it may be appropriate to define "issuing judicial authority" in such a way as to ensure that proportionality receives consideration by a judge.[33]

Neither *Poltorak* nor *Assange* provides any real answer to the question what functions the public prosecutor must perform so as to satisfy the requirement of judicial control in the issuing Member State. *Assange* is, in this respect, more illuminating than *Poltorak*, in the sense that *Assange* considers the entire procedure in the

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30 *Assange*, para. 50 *per* Lord Phillips of Worth Matravers PSC

31 *Assange*, para. 79 *per* Lord Phillips of Worth Matravers PSC

32 *Assange*, para. 84 *per* Lord Phillips of Worth Matravers PSC

33 *Assange*, para. 90 *per* Lord Phillips of Worth Matravers PSC

issuing Member State, and the *obiter dicta* cited above suggest the proper *locus* of proportionality assessment. Some of the issues raised in these two cases concerning the order in Sweden for issuing European arrest warrants can be developed in light of the CJEU's decision in *XD*.

It is once again Rechtbank Amsterdam that has raised questions on the validity of a European arrest warrant issued by a Swedish authority, now for the purpose of criminal investigation/prosecution. In *XD*,[34] a European arrest warrant was issued by the Swedish public prosecutor for the purpose of conducting a criminal investigation into alleged narcotic offences; the European arrest warrant was based on an order to remand the suspect into custody made by a court earlier on the same day. In *XD*, the CJEU basically applied the principle established in *OG & PI*[35] on the requirement of a 'dual level of protection' of fundamental rights to the situation in Sweden. The CJEU reiterated this principle by stating that it was clear from the case law that

> … the European arrest warrant system entails a dual level of protection of procedural rights and fundamental rights which must be enjoyed by the requested person, since, in addition to the judicial protection provided at the first level, at which a national decision, such as a national arrest warrant, is adopted, there is the protection that must be afforded at the second level, at which a European arrest warrant is issued, which may occur, depending on the circumstances, shortly after the adoption of the national judicial decision [reference to the case law omitted].[36]

However, having established the requirement of a dual level of protection, the CJEU clarified that the nature of the protection did not need to be the same at the different levels. For the most important fundamental rights, a higher level of protection would be required. In this way, the CJEU explained,

> … as regards a measure, such as the issuing of a European arrest warrant, which is capable of impinging on the right to liberty of the person concerned, that protection means a decision meeting the requirements inherent in effective judicial protection should be adopted, at least, at one of the two levels of that protection [reference to the case law omitted].[37]

In this respect 'a decision meeting the requirements inherent in effective judicial protection' means no less than a court decision; this higher level of protection is required when decisions are taken that impinge on the right to liberty of a person. According to the CJEU, at least one level of the protection afforded in the issuing Member State must therefore be a court decision and it is only natural that this higher level of judicial protection should address the basic question of whether a deprivation of liberty is at all justified. After considering the Swedish Government's submission concerning the assessment of proportionality, the CJEU concluded that the Swedish system "[met] the requirement of effective judicial protection".[38] This conclusion is based partly on the understanding that the Swedish court issuing the domestic custody order, "must also assess the proportionality of other possible measures, such as the issuing of a European arrest warrant".[39] It is

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[34] Case C-625/19 *XD* 'Openbaar Ministerie (Public Prosecutor's Office, Sweden)', judgment of 12 December 2019, EUC:2019:1078

[35] Joined Cases C-508/18 & C-82/19 PPU *OG & PI* 'Public Prosecutors Offices in Lübeck and Zwickau', judgment of 27 May 2019, EU:C:2019:456

[36] *XD*, para. 38

[37] *XD*, para. 39

[38] *XD*, para. 53.

[39] *XD*, para. 47.

submitted that this observation is taken out of context since this line of reasoning is most relevant in those quite different cases when the court needs to assess the risk of abscondment of a suspect who is not a permanent resident in Sweden. In such cases the possibility of issuing a European arrest warrant should count as a reason against remand into custody if the risk consists in possible flight to another EU Member State; this reasoning is obviously not applicable when the suspect is not present in Sweden as when one is dealing with the issue of a European arrest warrant. The CJEU's conclusion is, furthermore, based on the Swedish Government's submission that the court's decision on the custody order must include an assessment of the proportionality of issuing a European arrest warrant since the only reason for the prosecutor to request custody order is to issue a European arrest warrant.[40] This observation reflects, admittedly, the practical reasons for – and consequences of – a request for a custody order. However, there is no specific statutory requirement for the court to perform a proportionality assessment in terms of the European arrest warrant. The relevant provisions require the courts to assess whether a deprivation of liberty is justified, not whether the physical transfer of a person from one State to another is proportionate. There has, unsurprisingly, not been any report of cases in which a domestic order for remand into custody is refused on the ground that the issue of a European arrest warrant is disproportionate. It is however within the court's power to interpret the Swedish statute in conformity with EU law and include within the consideration of the domestic order a proportionality assessment for a potential European arrest warrant. In this respect, it would be desirable if the Supreme Court would grant leave of appeal in this question, thus providing an opportunity for setting a precedent in this matter. The Supreme Court has, however, provided a precedent in the separate matter of the temporal validity of an order for remand into custody.

In NJA 2015 s. 261, J.A. was remanded in custody *in absentia* pursuant to a custody order of a Swedish district court (subsequently confirmed by a court of appeal) for alleged sexual offences, including rape. A European arrest order was then issued for the surrender of J.A. from the UK to Sweden for the purpose of conducting criminal investigation. The competent judicial authority in the UK granted the request for surrender to Sweden, but J.A. had made himself unavailable by taking refuge at a foreign embassy located in London. Enforcement of the surrender order by the UK authorities would not be possible, therefore, without breaching the inviolability of diplomatic premises, and the UK justifiably refrained from the enforcement. J.A. was therefore not, under the circumstances, legally under the actual custody of the UK authorities.

At the time of the hearing at the Supreme Court, more than three years had elapsed since the order to surrender was granted. All this time the original order for remand into custody was still valid since various attempts by the defence of J.A. had failed to have the order rescinded through appeals within the Swedish court system.[41] The main issue for the Supreme Court to decide was whether, under the circumstances, the custody order was still proportionate. Obviously, the situation had arisen as a consequence of a European arrest warrant, but the Supreme Court was tasked with assessing the proportionality of the domestic order to remand J.A. into custody and the Supreme Court's reasoning was based entirely on the interpretation of the Swedish statute on the domestic order. In this regard, the Supreme Court reiterated the basic principle of proportionality in domestic law, which meant, *inter alia*, that the least coercive means had to be used in order

[40] *XD*, para. 48

[41] An order of remand into custody must under Swedish law be reviewed periodically (usually every two weeks) when a suspect is actually detained, but an order made *in absentia* remains valid until the suspect is actually apprehended.

to attain the purpose of the coercive measure.[42] The Court then stated that, for extending the period of custody of a person actually under detention, consideration had to be given to the period of detention already undertaken and the period that the person would be expected to remain under detention. Other factors that should be taken into account included the seriousness of the crime involved, how complicated the investigation was and how efficiently the prosecution had conducted the investigation.[43] Turning more specifically to remand into custody *in absentia*, the Supreme Court pointed out that the weighing of opposing interests had to take into account the fact that the suspect was not actually under custody, meaning that the order given *in absentia* did not entail the actual deprivation of liberty of the person concerned, even though the freedom of movement of the person might be curtailed in some ways.[44] The Supreme Court found that in general the harm to the suspect who was remanded *in absentia* should therefore weigh much less than the harm to a person who actually was deprived of liberty;[45] and this would have consequences for the weighing of the conflicting interests. Moreover, the prosecution should consider other means of conducting the investigation if questioning of the suspect after surrender proved to be unlikely to give result.[46] Applying these principles to the facts of the case, the Supreme Court found that the only period of actual detention of J.A. in the UK was a period of just over one week when J.A. was initially apprehended[47] (since J.A. was released on bail after the initial hearing and was no longer under detention). The Supreme Court stated categorically that J.A.'s period of stay at the foreign embassy would not have any significance for the purpose of the proportionality of the continued validity of the custody order *in absentia*[48] and arrived at the conclusion that J.A.'s right to liberty or freedom of movement had not been restricted to such an extent that the continued validity of the custody order *in absentia*, in itself, would constitute a breach of the rights of J.A. according to the ECHR. On the other hand, the prosecution had to conduct the investigation efficiently, e.g. by trying alternative means of achieving the same result. In the case at hand, the prosecutor had made some efforts to arrange for questioning of J.A. in London instead of having him surrendered to Sweden for questioning. This attempt by the prosecutor to try an alternative measure to surrender was found to be sufficient, by the majority of the Court, to justify the continued validity of the custody order. The European arrest warrant issued on the basis of the domestic order remained therefore in force. The Supreme Court did not address the issue of the European arrest warrant directly and it did not have the power to rescind the European arrest warrant even if it had found that the continued validity of the domestic order was disproportionate.[49]

NJA 2015 s. 261 shows thus a prosecution-friendly approach adopted by the Supreme Court when assessing proportionality of continued validity of a domestic order for remand into custody. It was mentioned in connection with the discussion of *XD* above, that the Swedish Government had argued that proportionality of the issue of the European arrest warrant would be considered in connection with an appeal against the district court's order of remand into custody (or an appeal against the continued validity of the order), which would

[42] NJA 2015 s. 261, para. 7

[43] NJA 2015 s. 261, para. 8

[44] NJA 2015 s. 261, para. 9

[45] ibid.

[46] NJA 2015 s. 261, paras 10–11

[47] NJA 2015 s. 261, para.15

[48] ibid.

[49] The reasoning of the Supreme Court is therefore of a general character. This reasoning would therefore be equally applicable to cases not involving a European arrest warrant, e.g. when dealing with requests for extradition from non-EU States.

mean that proportionality was being scrutinized by a judicial authority. But as NJA 2015 s. 261 shows, the issue of the European arrest warrant was only dealt with indirectly in the appeal proceedings. In the proportionality assessment itself, the fact that the suspect is not present in Sweden (for the most part through abscondment) is itself something that counts heavily against the suspect while the requirement of efficient investigation by the prosecution can be satisfied by a minimal effort following an extended period of inactivity. Therefore, once an initial European arrest warrant has been issued, it would require in practice quite extraordinary circumstances in order for the court to rescind the domestic custody order. As mentioned above, there is no report of a court decision finding that deprivation of liberty in the form of remand into custody is justified but that the issue of a European arrest warrant as such is disproportionate.

Finally, as a quite different matter, it may be mentioned that a positive decision to issue a European arrest warrant is not necessarily a disadvantage in the perspective of the requested person. In some odd situations, not envisaged in Ordinance 2003:1178, the Swedish public prosecutor may be asked by the authority in an EU Member State whether Sweden would wish to avail itself of the opportunity to issue a European arrest warrant for the surrender to Sweden of a person who is a Swedish national or whose permanent residence is in Sweden. This is a consequence of the *Petruhhin* line of judgments of the CJEU,[50] which require a Member State that does not extradite its nationals to a non-EU State to investigate whether it is possible to surrender a non-national EU citizen in that State to that citizen's home State instead of extraditing him or her to the non-EU State. However this rationale for issuing a European arrest will not be discussed further as it falls beyond the scope of the present study.

[50] See Case C-182/15 *Petruhhin*, judgment of 6 September 2016, EU:C:2016:630; Case C-191/16 *Pisciotti*, judgment of 10 April 2018, EU:C:2018:222; Case C-247/17 *Raugevicius*, judgment of 13 November 2018, EU:C:2018:898; Case C-897/19 PPU *I.N.* 'Ruska Federacija', judgment of 2 April 2020, EU:C:2020:262 and Case C-398/19 *BY* 'Generalstaatsanwaltschaft Berlin (Extradition to Ukraine)', judgment of 17 December 2020, EU:C:2020:1032.

Section II – The execution of EAWs: national judicial authorities as monitors of trust

Whereas it can be questioned whether the *issuance* of European arrest warrants for *surrender to Sweden* is sufficiently safeguarded by a judicial assessment of proportionality and the rules on the issuing procedure are found in ordinances and inferior instruments rather than acts of parliament, the decision on *execution* of a European arrest warrant for surrenders *from Sweden* lies squarely within the competence of the courts, i.e. judicial authorities, and the principal rules governing surrenders to another EU Member States have been laid down in the rather comprehensive *Act (2003:1156) on the surrender from Sweden pursuant to a European arrest warrant* (*lagen om överlämnande från Sverige enligt en europeisk arresteringsorder*, hereafter 'EAW Act').

It is unnecessary to describe the EAW Act in detail for the purpose of the present study. The Swedish act follows the basic pattern set out in FD-EAW and defines firstly the basic conditions for the application of the European arrest warrant and the executing judicial authorities' obligation to comply with a request for surrender. The act then enumerates the exhaustive grounds for refusing enforcement of the arrest warrant, before taking up matters concerning the procedure including time limits and the requested person's rights, followed by miscellaneous provisions on matters such as the actual surrender, speciality, subsequent surrender to another Member State, transit, etc.[51] The parts of greatest interest for the present study deal with the basic conditions for application of the system with surrender pursuant to a European arrest warrant and the different grounds for non-execution.

Ch. 1 Sec. 1 states that the EAW Act transposes the FD-EAW. This serves as a reminder that the Swedish act has its origin in EU legislation and the act must be interpreted to give effect to that legislation and that the case law of the CJEU must be taken into account when interpreting the Swedish statute. Ch. 2 Sec. 1 states the basic obligation to surrender if nothing to the contrary is provided for in the statute. The scope of the European arrest warrant, as defined in FD-EAW, is transposed in Swedish law through the central provision in Ch. 2 Sec 2 of the EAW Act on the basic condition (in the sense of *sine qua non*) for the applicability of the system of surrender. This legislative technique combines thus (1) the scope of offences covered in the issuing Member State (viz. for the purpose of investigation/prosecution, when acts punishable by a custodial sentence etc. for a maximum period of at least twelve months and, for the purpose of enforcement, when a sentence has been passed of at least four months with (2) the requirement of double criminality, which according to FD-EAW is an optional ground for non-execution. For readers of the Swedish act, double criminality is thus a necessary condition of application altogether and not treated as a ground for non-execution. The obligation pursuant to Art. 2(2) FD-EAW to surrender in respect of so-called 'list offences' is implemented in the Swedish EAW Act as an exception to the basic requirement of double criminality. In this way, only when the double criminality test is passed, or when the list-offence exception is applicable, would the court proceed with considerations of grounds for non-execution of the arrest warrant. This has implications on when the courts actually need to address directly issues on fundamental rights and the type of cases that get appealed to the courts of appeal.

[51] For a detailed description, in English, of the EAW Act, see Wong (2011).

As it is for the issuing judicial authority to ascertain that the penal threshold is satisfied before issuing a European arrest warrant, the main task of the Swedish executing juridical authority is to check whether the requirement of double criminality is fulfilled, or, alternatively, if the 'list-offence' exception is applicable. The determination of double criminality does not pose any special problems in Sweden. The concept of 'crime' or 'criminal offence' under Swedish law is very extensive as even relatively minor regulatory or administrative offences are criminal offences and there is no distinction between different categories of criminal offences based on the seriousness of the crime. Thus, both 'murder' and 'speeding' are crimes according to Swedish law, and the requirement of double criminality will be met. One peculiarity of Swedish law should however be mentioned in this context. Some crimes committed through the use of the printed press or ethereal media (t.ex. hate speech, child pornography and certain incitement to commit crimes) are treated as crimes against the two constitutional acts (the Freedom of the Press Act (1949:105) *Tryckfrihetsförordningen* and the Fundamental Law on the Freedom of Expression (1991:1469) *Yttrandefrihetsgrundlagen*) follow some special rules for criminal responsibility. For example, it would be the publisher of a newspaper who will be criminally responsible for publishing the hate speech and not the author of the text itself. In such cases the requirement of double criminality will not be satisfied if a European arrest warrant has been issued for the surrender of the author.[52]

When the basic conditions in Ch. 2 Sec. 2 are met, the court must consider whether the court is required to refuse surrender on any of the grounds stated in Sec. 3–5. The statute is constructed in such a way that when a ground of refusal according to Sec. 3 or Sec. 4 points 2–3 is established, the requested person may not be surrendered to the issuing Member State under any circumstance. However, if the ground of refusal is regulated under Sec. 4 point 1 or Sec. 5, the court is required to refuse surrender only in respect of a specific offence, which means that the requested person can still be surrendered for other offences. Sec. 3–5 of the EAW Act are, therefore, not organized in a way to reflect whether they are mandatory or optional grounds for non-execution according to FD-EAW.

All grounds for non-execution according to the framework decision, i.e. both mandatory and optional grounds, have been transposed into Swedish law as *mandatory rules* for the court to refuse surrender (Ch. 2 Sec. 3–5 EAW Act). The relevant rules prescribe that "surrender may not be granted" (*överlämnande får inte beviljas*) in a number of situations. The use of the negation in the statutory text means, in accordance with the rules of statutory interpretation in Swedish law, that there is no room for discretion for the court to decline to surrender the requested person after all, as soon as a ground for non-execution is at hand. In the preliminary work to the EAW Act, it has been stated that since the framework decision is directed to the Member States, optional grounds for non-execution provided for in FD-EAW enable the Member States to choose whether to adopt a specific ground in its own legislation; but once it has chosen to include such a ground it is up to that Member State to decide whether the ground should be mandatory or optional within its own legal system.[53] This can be explained by the wish to promote efficient and uniform application of the law. The legislator (the Swedish Parliament in this case) can, however, also be said *not* to have shown its own courts the degree of trust that would allow them to apply the grounds for non-execution with discretion having regard to the

[52] Sweden would have preferred to include an optional ground of non-execution for such freedom of expression offences, which did not appear in the final text of the framework decision. Instead, a second paragraph was added to recital 12 to the preamble of the FD-EAW stating that the framework decision "does not prevent a Member State from applying its constitutional rules relating to … freedom of the press and freedom of expression in other media".

[53] See Swedish Government (2003), p. 70.

circumstances in an individual case. The flip side of the restriction on the courts' ability to exercise discretion is, however, a stronger protection against surrender of the requested person and this is not necessarily a disadvantage in the perspective of the requested person. The mandatory nature of the Swedish provisions on non-execution appears however to be in conflict with the finding of the CJEU in *Popławski*.[54] In that case, the Court clearly stated that "where a Member State chose to transpose that provision into domestic law, the executing judicial authority must, nevertheless, have a margin of discretion as to whether or not it is appropriate to refuse to execute the EAW".[55] This finding is confirmed in *X (European arrest warrant – Ne bis in idem)*[56] where the CJEU stated that "when they do opt to transpose one or more of the grounds for optional non-execution provided for in Article 4 of the Framework Decision, Member States cannot provide that judicial authorities are required to refuse to execute any European arrest warrant formally falling within the scope of those grounds, without those authorities having the opportunity to take into account the circumstances specific to each case". A literal application of the Swedish provisions on mandatory refusal to surrender will therefore be incompatible with EU law. While a legislative amendment is desirable to reflect the position of EU law, it is submitted that the Swedish courts must nonetheless interpret in conformity with EU law and, if necessary, choose to grant a request for surrender even if the text of the Swedish statute says that surrender may not be granted.[57] In *Greek in absentia judgment*, the Supreme Court has addressed the question of using mandatory rules in Swedish legislation for transposing optional grounds of refusal, see section II (*in fine*) of this report.

Sec. 3 of the Swedish Act identifies six grounds when surrender of the requested shall be refused altogether. Point 1 merely states that a request for surrender cannot be granted if the form or content of the arrest warrant is so defective that it cannot be used at all to base a decision on surrender. Although this is not an explicit ground for non-execution according to FD-EAW, this point only states the obvious that serious defects in the warrant must be an exception to the general duty to comply with a European arrest warrant. Point 2 states that a European arrest warrant for the purpose of prosecution of a national or resident of the executing Member State shall not be enforced if the issuing judicial authority does not provide a guarantee that the person be returned to the executing Member State in order to serve possible sentences passed against that person. This gives effect to the specific condition provided for in Art. 5 FD-EAW in which the executing judicial authority may require guarantees from the issuing judicial authority in certain situations. Point 3 states that a request from a Member State shall be denied if a decision has already been made that the requested person would be surrendered to another Member State. This point provides mere a statutory basis for refusing to execute a European arrest warrant as a result of multiple requests for the surrender of the requested person, a problem that should be resolved in accordance with Art. 16 of FD-EAW. Point 4 states that a European arrest warrant shall not be executed if the requested person is to be surrendered to an international criminal tribunal such as the International Criminal Court and can be justified, *inter alia*, by reference to Art. 16(4) FD-EAW. Point 5 states that the requested person shall not be surrendered to another Member State pursuant to a European arrest warrant if this will be in breach of a condition for surrender or extradition of that person to Sweden, which is a situation envisaged in Art. 21 FD-EAW on competing international obligations. Point 6 deals

[54] Case C 579/15 *Popławski*, judgment of 29 June 2017, EU:C:2017:503.

[55] *Popławski*, para. 21

[56] Case C-665/20 *X (European arrest warrant* – Ne bis in idem*)*, judgment of 29 April 2021, EU:C:2021:339.

[57] A possible situation when this could happen is when Sweden is confronted with the choice of extraditing a person to a non-EU State or to surrender the person to an EU Member State. Cf. the *Petruhhin* type of cases referred to in note 50 above.

with refusal for enforcement of sentences passed *in absentia* and transposes Art. 4 a FD-EAW; on this point see the discussion on *Greek in absentia judgment* Below.

Sec. 4 takes up three grounds for non-execution of a European arrest warrant. Point 1 provides that surrender shall not be granted for an offence that the requested person has committed before he or she has reached 15 years of age. This corresponds to Art. 3(3) FD-EAW, which precludes surrender of minors who cannot be held criminally responsible according to the law of the executing Member State.[58] Point 2 states that a request for surrender shall be denied if the surrender would violate the European Convention on Human Rights or any of its additional protocols that are applicable in Sweden. This human-rights override cannot be said to correspond to any of the grounds for non-execution enumerated in FD-EAW. This provision in the EAW Act may come into conflict with EU law as the Swedish courts are required, according to point 2, to carry out an own assessment of compatibility with the ECHR while the CJEU has ruled in *Melloni*[59] that the grounds for non-execution provided for in the framework decision are exhaustive and Member States may not introduce new grounds or refer to other sources of law in order to refuse execution of an otherwise valid European arrest warrant. In particular the CJEU has stated that the Council has already taken the ECHR into consideration when adopting the framework decision. However, at the time of the transposition of the framework decision the inclusion of such a 'human rights clause' was not seen as controversial. More will be said on this point in the discussion of case law below. Point 3 of this section states that the request to surrender shall be denied if the requested person enjoys privileges and immunities under international law. This reflects the implicit understand that Member States are not required to breach their international law obligations in order to comply with the framework decision although they should, in accordance with Art. 20 FD-EAW, attempt to obtain waiver of privileges and immunities if possible.

Sec. 5 contains seven grounds to refuse surrender with respect to certain conducts, which all constitute grounds for non-execution according to the FD-EAW. Point 1 provides that surrender shall be refused if an act is subject to pardon etc. under Swedish law, which corresponds to Art. 3 numeral 1 FD-EAW. Point 2 states that surrender shall not be granted if the conduct has been subject to a Swedish decision not to prosecute, which corresponds to the first component of Art. 4 numeral 3 FD-EAW. Point 3 precludes surrender for an act for which final judgment has already been given by a court in an EU Member State, Iceland or Norway, permitted as an optional ground for non-execution according to the second component of Art. 4 numeral 3 FD-EAW in combination with Art. 4 numeral 5 FD-EAW. Point 4 extends the application of point 3 to third States if extradition would not have been possible according to the Swedish law on extradition; even this ground of non-execution is permitted according to Art. 3 numeral 5 FD-EAW. Points 5 deals with non-execution if a criminal investigation has already been initiated, or a prosecution has already been brought, in Sweden, as permitted by Art. 4 numeral 2 FD-EAW. Point 6 states that surrender for a certain conduct shall be denied if punishment of the person is statute-barred according to Swedish law and the conduct has taken place wholly or partially in Sweden or when the requested person is a Swedish national. This ground of non-execution is attributable to Art. 4 numeral 4 FD-EAW, which permits non-execution generally on grounds of prescription (statute bar). But the Swedish legislator has chosen to restrict the application of this ground only to conducts

[58] Theoretically children under 15 years of age can, under Swedish law, be responsible for a criminal offence, but they cannot be sentenced to a criminal sanction pursuant to Ch. 1 Sec. 6 of the Criminal Code (1962:700) *brottsbalken*. On this issue see Bennet (2022), 161–162.

[59] Judgment of 26 February 2013, *Melloni*, C-399/11, EU:C:2013:107

in Sweden or conducts by Swedish nationals as there appears to be no reason to refuse surrender for a conduct by non-Swedish nationals that took place outside Sweden. Finally, according to point 7, double criminality is required for conduct that has taken place wholly or partially in Sweden. As the requirement of double criminality is already the main rule under the basic condition for applicability of the European arrest warrant system, the ground of non-execution under point 7 is only relevant for crimes subject to the 'list-offence exception'. This ground of non-execution corresponds to Art. 4 numeral 7(a) FD-EAW.

Having provided an overview of the structure for determining whether a European arrest warrant shall be executed, the remainder of this section will examine some of the case law of the Swedish Supreme Court.

NJA 2005 s. 897 is the first case that reached the Supreme Court after the entry-into-force of the EAW Act on 1 January 2004. A European arrest warrant was issued for the surrender of A.P. to Finland for the enforcement of a combined sentence of more than five years' imprisonment related to more than 70 criminal offences. Among these criminal offences was the Finnish offence of abscondment, which was not a criminal offence under Swedish law. The requirement of double criminality was therefore not fulfilled and A.P. should not be surrendered to Finland for that offence. Two technical questions arose, however: (i) whether Sweden could refuse to surrender A.P. altogether, since it was not apparent how much of the combined sentence actually pertained to abscondment and (ii) whether the minimum of four months of custodial sentence to be served after the surrender applied to the combined sentence or was it necessary that this minimum be applied to each and every one of the more than 70 offences in this case. In hindsight, the answers to these questions may appear obvious, but in the early days of the European arrest warrant, they were considered sufficiently interesting to merit an examination by the Supreme Court, if not by the CJEU via a request for preliminary ruling. More interesting for the purpose of this study is however the treatment by the Supreme Court of issues concerning fundamental rights, rather than the answers to be given to the questions of interpretation of the provisions of the framework decision.

When issues of fundamental rights are raised in the context of the European arrest warrant, the focus is usually put on alleged past violation – or potential future violations – of fundamental rights in the *issuing* Member State. In this case, the first complaint of the appellant concerned, however, an alleged violation of Art. 6 ECHR in the proceedings in Sweden, i.e. the *executing* Member State. A.P. complained that his right to a fair trial had been infringed in the European arrest warrant proceedings since the case file had not been translated into Finnish (A.P.'s native language) and an oral hearing had not been held at the court of appeal[60]. Since Art. 6 ECHR did not confer on the defendant the right to have the case file, as such, to be translated into a language that he or she understands, nor an unconditional right to an oral hearing, the Supreme Court dismissed A.P.'s claim summarily. At this stage of development of the nascent system of surrender between EU Member States, it was not self-evident that European arrest warrant proceedings were to be regarded as criminal proceedings – as decisions on surrender were not aimed at determining criminal charges against the requested person – for the application of Art. 6 ECHR, triggering the full range of defence rights under that article.[61] But by engaging

[60] An oral hearing took place, however, at the district court during the initial determination of the case.

[61] In this context, one may be reminded of later EU legislation strengthening the rights of the requested person, e.g. through EP and Council directive (EU) 2016/1919 on legal aid in European arrest warrant proceedings. Arguably, rights explicitly provided for in legislation, such as the right to legal aid, may have been part of the defence rights already under Council framework decision 2002/584/JHA, if the framework decision is interpreted in conformity with the ECHR.

with Art. 6 ECHR, the Supreme Court acknowledged that the requested person in a European arrest warrant proceeding had the same rights as someone who was 'charged with a criminal offence' and, consequently, the requested person had the right 'to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him',[62] even though the Supreme Court found that these rights had not been infringed upon in this particular case.

Turning to the appellant's main complaint in NJA 2005 s. 897, however, the alleged breaches of the ECHR were attributed to Finland, i.e. the issuing Member State. A.P. asserted that his rights according to Art. 5 and Art. 6 ECHR had been violated because his conviction in Finland was wrongful as some Finnish police officers had been found guilty of withholding A.P.'s case file from him, and because his personal safety in Finnish penitentiary facilities could not be guaranteed due to risk of reprisals from others. Even in this part, the Supreme Court dismisses A.P.'s claim summarily. However, what is interesting here is not the arguments on whether there have been violations of the ECHR. What is noteworthy, instead, is the fact that A.P.'s argument and the Supreme Court's response is constructed in such a way that if his allegations about violations of the ECHR is substantiated, the Swedish court must refuse to execute the European arrest warrant according to the provision in the EAW Act (point 2 in Ch. 2 Sec. 4), which provides that surrender may not be granted if this would entail a violation of the ECHR.[63] According to this logic, it is the Swedish domestic provision that requires the court to refuse execution of the arrest warrant, not the violation of the ECHR as such. The tacit acceptance of this logic will turn out to be particularly problematic after the judgment of the CJEU in *Melloni*,[64] since, as mentioned above, the ground of refusal according to point 2 in Ch. 2 sec. 4 is not part of the exhaustive list of grounds for non-execution according to Council framework decision 2002/584/JHA.

Shortly after NJA 2005 s. 897 the Supreme Court had another opportunity to offer a precedent in the area of European arrest warrants. In NJA 2007 s. 168, M.B., a Polish national, was requested, through a European arrest warrant issued in 2006, to be surrendered to Poland for the purpose of prosecution of charges related to fraud committed in Poland in 1991. M.B. raised three main arguments against his surrender to Poland.

M.B. argued, in the first place, that surrender would entail breach of his right to a fair trial according to Art. 6 ECHR partly because the alleged crimes had been committed more than 15 years ago and a trial after this long delay would be inherently unfair and partly because he would, if he were surrendered to Poland, be held in pre-trial detention for a considerable time, which would entail a violation of his right to a fair trial within reasonable time. However, the Supreme Court did not examine the merit of M.B.'s argument. Instead, the Court referred immediately to the principle of mutual recognition and stated that there was only very limited room for refusing to execute a European arrest warrant and dismissed M.B.'s argument summarily.[65]

In addition to Art. 6, M.B. argued that Art. 7 ECHR on retroactive application of criminal law would be violated if he were surrendered to Poland. M.B. noted that prior to Poland's entry into the EU in 2005 his transfer to Poland for the purpose of prosecution would have to be dealt with in an extradition procedure. For the alleged

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62 See Article 6(3)(a) ECHR.

63 The application of Ch. 2 Sec. 4 EAW Act would preclude surrender of the requested person altogether and not just for the specific offences where a violation of ECHR has occurred or is at risk.

64 See note 59.

65 NJA 2007 s. 168, at 178

crimes committed in 1991, prosecution in Sweden would be statute-barred in 2001 according to the Swedish statute of limitation, extradition would in that case not be granted according to the Swedish law on extradition. M.B. argued in essence that he should enjoy the benefit of prescription of the crimes in 2001 and to reopen the possibility of prosecution after that date would amount to retroactive application of criminal law. Admittedly, as mentioned above in the description of the structure for determining whether a European arrest warrant should be executed, the FD-EAW permits the prescription of a crime according to the law of the executing Member State to serve as an optional ground for non-execution of a European arrest warrant. However, Sweden has chosen to make use of this ground only partially. As stated above, Ch. 2 Sec. 5 point 6 of the EAW Act provides a ground for non-execution for reason of statute-bar only with respect to crimes committed in Sweden or by Swedish nationals. M.B. was therefore not covered by this ground as he remained a Polish national even though he had been resident in Sweden for more than 15 years. In this part, the Supreme Court only looked at the wording of the EAW Act and dismissed M.B.'s argument without examining whether the statute itself would be in conflict with the prohibition of retroactive application of criminal law.[66] This case also shows that EU citizens who are not Swedish nationals are afforded a weaker protection against surrender than Swedish nationals, it could be questioned whether this disparate treatment of Swedish and non-Swedish nationals is justified within the framework of EU citizenship.

Finally, M.B. argued that his surrender to Poland where he would be held in pre-trial detention for a considerable length of time would constitute a breach of United Nations' Convention on the Rights of the Child as he had two minor children in Sweden and his surrender would not be compatible with the best interest of the children. In this respect the case for M.B. was very weak. However, what is important to note here is that the Supreme Court did not examine the merit of M.B.'s argument and dismissed it simply by stating that the Convention was not (at the time) binding law in Sweden and no reference to the Convention was made in the EAW Act.[67]

This case shows that the Supreme Court's approach to the EAW Act is rather tied to the actual wording of the statute. The principle of mutual recognition has been given such a strong position that very little room can be given to substantive arguments on actual or potential violation of human rights in the issuing Member State.

In NJA 2009 s. 350 a European arrest warrant was issued by the Polish authority for the purpose of enforcement of a prison sentence for assault imposed on D.D. following a trial *in absentia*. D.D. had been informed of the details of the trial and was called to attend the trial in Poland. D.D. was sentenced to a suspended sentence of 10 months following the trial *in absentia*. Almost two years after the trial the court in Poland decided to convert the suspended sentence to actual imprisonment on account of D.D.'s misconduct during the period of probation. D.D. was not called to the proceeding in which his suspended sentence was converted to actual incarceration. Based on this fact D.D. argued that a guarantee for a new trial should be sought from the Polish authority as a condition for granting the surrender. The Supreme Court held that for the purpose of guarantee of a new trial after a sentence had been imposed following a trial *in absentia*, the 'trial' meant a proceeding in which a determination of guilt and sentence was made. As the conversion of the suspended sentence did not

[66] ibid.

[67] NJA 2007 s. 168, at 179. It may be mentioned that the Convention on the Rights of the Child has now been incorporated as Swedish law and from 1 January 2020 the Supreme Court would, in extradition proceedings, consider the Convention (alongside ECHR), when examining whether there are legal obstacles against granting extradition. The incorporation of the Convention on the Rights of the Child as Swedish law has not affected the EWA Act.

involve such a determination, the question of guarantee would not arise. No other matter of significance had been raised in this case other than, perhaps, that this decision confirmed the principle stated in NJA 2007 s. 168, that a request for surrender could not be refused on other grounds than those provided for in the EAW Act. This decision of the Supreme Court has lost almost all its precedential value as the EAW Act has been amended following the addition in 2009 of a new Art. 4a to FD-EWA dealing with various aspects of trials *in absentia*.

Following these precedents of the Supreme Court from the early years of the new system of surrender pursuant to a European arrest warrant, the practice of the inferior courts, acting as executing judicial authorities, appeared to have stabilized. This practice was characterized by a heavy emphasis on mutual recognition and arguments based on the infringement of rights in the issuing Member State were most often dismissed summarily. This practice was reinforced after the CJEU's judgment in *Melloni*,[68] which stressed the exhaustiveness of the grounds for non-execution and the irrelevance of human rights legislation under national law. During this period, automaticity characterized the operation of the system of surrender pursuant to a European arrest warrant. The Swedish courts acting in their capacity as executing judicial authorities had tended to accept the legal determination based on the principle of mutual recognition. In particular, when applying the ground of non-execution with respect to certain judgments *in absentia*, the courts were generally satisfied with the statement made in the arrest warrant that the conditions stated in Art. 4a FD-EAW were complied with.[69] This position has changed after the Supreme Court rendered its decision in *Greek in absentia judgment* in 2022 (see below).

A major change occurred, however, after the CJEU's judgment in *Aranyosi & Căldăraru*.[70] Arguments based on violation of human rights (based more specifically on poor detention conditions) have been revitalized and for some time surrender to Romania and Hungary has been put on ice. A new precedent is needed and by the time the matter is taken up by the Supreme Court there has been significant development in the case law of the CJEU on which the Supreme Court can base its decision.

NJA 2020 s. 430 deals with a European arrest warrant issued for the surrender of O.C. to Romania for the purpose of enforcement of a prison sentence. Prior to the case heard by the Supreme Court a previous request for surrender was denied on the ground that there was a serious risk that O.C., once surrendered to Romania, be subject to conditions of detention that would constitute violation of Art. 3 ECHR. The prosecutor acting on behalf Romania had however obtained new information through the Ministry of Justice in Romania. In a statement by the 'Head of the Prison Safety and Regime Department', information was given on the actual prison facilities in which O.C. was likely to be placed as well as details on the conditions of these facilities. The statement also contained a guarantee that throughout the entire duration of detention, O.C. would have a personal space of at least 3 m^2 (including a bed and other furniture but excluding the toilet).[71] A new surrender proceeding was then initiated in which both the district court and the court of appeal again denied the request

[68] See note 59 above.

[69] In the decision of 30 March 2020 in case Ö 1503-20 on granting leave of appeal, the Supreme Court stated, however, that the certification by the issuing judicial authority that the summons to the court hearing has been correctly served is not sufficient that all conditions under Art. 4a FD-EAW have actually been fulfilled. On this point, it is submitted that the Supreme Court may have come to its conclusion based, perhaps, on an out-of-context interpretation of the CJEU's judgment in *Dworzecki* on Art. 4a FD-EAW (Case C-108/16 PPU, judgment of 24 May 2016, EU:C:2016:346).

[70] Joined cases C 404/15 *Aranyosi* & C 659/15 PPU *Căldăraru*, judgment of 5 April 2016, EU:C:2016:198

[71] NJA 2020 s. 430, para. 6

for surrender on the ground that the Romanian authorities had not shown to a sufficient degree of certainty, that O.C. would not be subject to treatment incompatible with Art. 3 ECHR. The prosecutor lodged an appeal, and it was for the Supreme Court to determine whether O.C. could be surrendered to Romania. In this way, the Supreme Court was tasked not only with making a ruling on a matter of law but also with making a determination on a matter of fact, viz. the risk of O.C. being subject to maltreatment.

In the early precedents presented above, the point of departure for arguments based on human rights have been Ch. 2 Sec. 4 point 2 of the Swedish EAW Act, which refers to the ECHR. In NJA 2020 s. 430 the Supreme Court had chosen to base its reasoning directly on Art. 3 ECHR and Art. 4 Charter of Fundamental Rights of the European Union (CFR), both of which prohibits torture as well as inhuman or degrading treatment and which, according to Art. 52(3) CFR, have the same meaning and scope. From this point of departure, the Supreme Court also established the absolute character of Art. 3 ECHR and Art. 4 CFR, in particular the fact that the prohibition of torture etc. could not be weighed against "considerations relating to the efficacy of judicial cooperation in criminal matters and to the principles of mutual trust and recognition".[72] By taking this step the Supreme Court displaced its previous emphasis on efficiency of the European arrest warrant system and the principle of mutual recognition. The link between Art. 3 ECHR and Art. 4 CFR also enabled the Supreme Court to draw upon the case law of both the Strasbourg and the Luxembourg courts as appropriate.

As a matter of law, the Supreme Court had to determine how the EAW Act should be applied having regard to *Aranyosi & Căldăraru*. In this respect the Supreme Court simply reiterated what was stated in *Aranyosi & Căldăraru*. As a first step, the executing judicial authority should ascertain – using objective, reliable, specific and properly updated information – whether there was a real risk that the requested person be exposed to inhuman or degrading treatment based on the general conditions of detention in the issuing Member State.[73] When such a general risk existed, the executing judicial authority should, as a second step, make further investigation into whether there were well-grounded reasons for believing that was a real risk of maltreatment under the particular circumstances surrounding the requested person. In this respect, the executing judicial authority should request supplementary information from the issuing Member State and postpone the decision on surrender until it had obtained information capable of removing the risk of maltreatment.[74]

As to the finding of fact, the Supreme Court came to the conclusion that there was in fact a general risk that surrender of O.C. to Romania would be incompatible with Art. 3 ECHR.[75] The Supreme Court had arrived at this conclusion after a review of objective and reliable sources including information provided by the Ministry of Foreign Affairs in Sweden, reports of the Council of Europe and the case law of the European Court of Human Rights, in particular its judgment in *Rezmiveş and others v. Romania*[76].[77] It remained therefore for the Supreme Court to determine if there was a real risk of inhuman or degrading treatment in this specific case. As mentioned above, the Supreme Court was in possession of, *inter alia*, a statement of the 'Head of the Prison

[72] The Supreme Court made a reference here to C-128/18 *Dorobantu*, judgment of 15 October 2019, EU:C:2019:857, in particular para. 82 for the quoted text.

[73] NJA 2020 s. 430, para. 25; cf. *Aranyosi & Căldăraru* (note 70 above), para. 89 ff.

[74] NJA 2020 s. 430, para. 26; cf. *Aranyosi & Căldăraru* (note 70 above), para. 92 ff.

[75] NJA 2020 s. 430, para. 47

[76] *Rezmiveş and others v. Romania*, application nos 61467/12, 39516/13, 48231/13 and 68191/13, judgment (4th section) of 25 April 2017, CE:ECHR:2017:0425JUD006146712

[77] NJA 2020 s. 430, paras 32–46

Safety and Regime Department' in Romania, in which it was stated that O.C. would be given a personal space of at least 3 m^2. Referring to *Muršić v. Croatia*,[78] the Supreme Court pointed out that a minimum personal space of at least 3 m^2 would not be conclusive of non-violation of Art. 3 ECHR as other material defects could render the detention conditions inhuman or degrading, even though the minimum personal space of 3 m^2 would remove the strong presumption of violation of Art. 3 along the *Muršić* line of reasoning.[79] One would therefore expect that the Supreme Court would carry out a careful analysis of the detailed information provided by the Romanian authority in order to determine whether there was a real risk of maltreatment in this particular case.

However the Supreme Court focused instead on the guarantee given by the Romanian authority that O.C., if he were surrendered, would not be subject to detention conditions incompatible with Art. 3 ECHR. In this respect, the Supreme Court referred to *ML*,[80] in which the CJEU held that when an assurance in this regard was given or endorsed by the issuing judicial authority or one of the central authorities of the issuing Member State, the executing judicial authority, in view of the mutual trust between the judicial authorities of the Member States, had to rely on that assurance, at least in the absence of any specific indications that the detention conditions in a particular detention centre were in breach of Art. 4 CFR. In *Dorobantu*[81] the CJEU stated explicitly that only in exceptional circumstances, and on the basis of precise information, that the executing judicial authority could find that, notwithstanding an assurance, there was a real risk of the person concerned being subjected to inhuman or degrading treatment. By relying on the assurance or guarantee of the issuing judicial authority to such a high degree, the logic of mutual trust resurfaced even though it was established at the outset that the absolute character of the prohibition of torture and inhuman or degrading treatment would preclude weighing against considerations of efficiency and mutual recognition and mutual trust.

The guarantee in NJA 2020 s. 430 had however been given by an official within the prison system in Romania and not by the issuing judicial authority. This meant that the guarantee could not be relied upon without further ado and should be evaluated by carrying out an overall assessment of all the information available to the executing judicial authority.[82] However, the Supreme Court argued that the assurance on detention conditions by a head of department at the prison service would be more informed than one given by the issuing judicial authority (which was the district court in Bacău in Romania). The Supreme Court also took into account that the assurance had been communicated to the Swedish executing authority via the Romanian Ministry of Justice, which acted as central authority for that Member State. The Supreme Court then continued and commented that even if some of the information given in the assurances could be questioned, it could hardly be in line with the mutual trust between Member States, that the executing Member State should require the issuing Member State to defend its assurances given in a specific case.[83] For these reasons the Supreme Court

[78] *Muršić v. Croatia*, application no. 7334/13, judgment (Grand Chamber) of 20 October 2016, CE:ECHR:2016:1020JUD000733413

[79] NJA 2020 s. 430, para. 21

[80] Case C-220/18 PPU *ML* 'Generalstaatsanwaltschaft (Conditions of detention in Hungary)', judgment of 25 July 2018, EU:C:2018:589. See in particular para. 112.

[81] See *Dorobantu* (note 72 above), in particular para. 69.

[82] NJA 2020 s. 430, para. 30. Cf. *ML* (note 80 above), para. 114.

[83] NJA 2020 s. 430, para. 50

found no reason to question the validity of the assurances provided[84] and concluded that O.C. could be surrendered to Romania for the enforcement of prison sentence.

NJA 2020 s. 430 appears to send mixed signals. On the one hand, the Supreme Court stated explicitly that rights according to Art. 3 ECHR/Art. 4 CFR are absolute and cannot be circumscribed through weighing them against considerations of efficiency and mutual trust. On the hand, the Supreme Court is prepared to rely on assurances or guarantees given by authorities in the issuing Member State based on the principle of mutual trust rather than to conduct its own risk assessment in the specific case. It remains to be seen what impact NJA 2020 s. 430 would have on the practice of the inferior courts bearing in mind that the number of surrender proceedings has reduced drastically as a result of the pandemic throughout most of 2020 and 2021.

From the case law of the CJEU,[85] it is known that in recent years the executing judicial authorities in some Member States have raised doubt as to whether surrender to Poland is at all possible due to the general concern on judicial independence as the result of rules on judicial appointments. Surrender from Sweden to Poland has however continued to take place on a regular basis.[86] In these cases the issue of the general deficiency in the justice system in Poland has either not been raised at all or is dismissed summarily if it is mentioned.

The Greek in absentia judgment Case

On 13 December 2022, the Supreme Court rendered a decision, with a majority of 3 to 2, to grant a request for surrender to Greece pursuant to a European arrest warrant. This decision is worth discussing as it deals with several issues of principle and forms a departure from the hitherto prosecutor-friendly approach shown in the Court's case law.[87]

The issuing authority in Greece requested the surrender of O.O. for the purpose of the (continued) execution of a prison sentence of nine years. The prison sentence handed down by the court of first instance in Greece was confirmed by the appeal court in the absence of O.O. It is not disputed that O.O. has not been summoned in person, but the Greek issuing authority has confirmed that conditions set out in Art. 4a of the FD-EAW are satisfied, which would mean that O.O. could be surrendered even though he has been sentenced *in absentia*.

The district court refused to surrender O.O. with an, for inferior courts, unusually lengthy account of its reasoning (4 pages).[88] Following *Dworzecki*, the point of departure was that the confirmation by the competent issuing authority (by ticking the relevant box in the standard form for the European arrest warrant) alone was not sufficient to show that the conditions laid down in Art. 4a of the FD-EAW were met. After considering the

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[84] NJA 2020 s. 430, para. 51

[85] See *inter alia* Case C 216/18 PPU *LM 'Minister of Justice and Equality (Deficiencies in the System of Justice)'*, judgment of 27.7.2018, EU:C:2018:586; Case C-354/20 PPU *L & P 'Openbaar Ministerie (Independence of the Issuing Judicial Authority)'*, judgment of 17.12.2020, EU:C:2020:1033 and Joined Cases C-562/21 PPU and C-563/21 PPU, *X & Y 'Openbaar Ministerie (Tribunal established by law in the issuing Member State)'*, judgment of 22.2.2022, EU:C:2022:100.

[86] See *inter alia* the decisions of Södertörn District Court (22.10.2021), Göteborg District Court (10.11.2021) and Göteborg District Court (25.3.2022) granting surrender to Poland.

[87] Leave for appeal has already been granted against other cases where a court of appeal has refused surrender, see e.g. decision (14.12.2022) in case no. Ö 6936-22 to grant leave to appeal against the decision of the Appeal Court of Western Sweden granting a request for surrender.

[88] Decision of Jönköping District Court (11.5.2022) in case no. B 1611-22.

information supplied by the issuing authority, the district court found that it could not be established unequivocally that O.O. had been informed of the trial by other means. Consequently, the request for surrender should be refused. The district court acknowledged that *Dworzecki* gave a small opening nonetheless for executing the surrender due to other circumstances. However, due to the mandatory nature of Sec. 3 of the Swedish EAW Act on grounds for refusal, the district court chose to disregard the limited opening to execute the surrender even though the conditions described in Art. 4a were not fulfilled.

Upon appeal, the Göta Court of Appeal, reversing the district court's decision, granted the surrender to Greece.[89] Based on the same facts as those presented at the district court, the court of appeal came however to the conclusion that the Swedish court had to accept the issuing authority's confirmation that the conditions set out in Art. 4a of the FD-EAW were fulfilled. The court did not explain, however, why it had come to this conclusion.

The Supreme Court shared the point of departure with the district court and found that the executing authority in Sweden had a duty to ascertain that the requested person's right to a fair trial had in fact been guaranteed through fulfilment of the conditions set out in Art. 4a in the FD-EAW. In this respect, the Supreme Court agreed with the district court that the confirmation by the issuing authority was it itself not sufficient; the executing authority had therefore to make its own determination based on the information known in the case. In this respect, the Supreme Court was following the legal principle set out in *Dworzecki*. As to the factual determination in the case at hand, the Supreme Court noted that even though the issuing authority had confirmed that it could unequivocally be established that O.O. had been informed of the trial, the issuing authority had "at the same time provided information that spoke for another direction".[90] The contradictory character of the facts led thus the Supreme Court to find that the conditions in Art. 4a of the FD-EAW were not fulfilled and, consequently, the European arrest warrant should not be executed.

The Supreme Court did consider the opening given in *Dworzecki*, mentioned above, to allow surrender even though the conditions in Art. 4a of the FD-EAW were not met, provided that the requested person's fair-trial rights had not been violated. In this connection the Supreme Court mentioned specifically that this opening was motivated by the fact that judgment rendered *in absentia* was a facultative ground for refusal. The Supreme Court also pointed out, referring to *X*,[91] that the use of mandatory national rules to transpose facultative grounds for refusal provided for in a framework decision is not compatible with EU law. However, just as in the district court, priority is given also by the Supreme Court, to the clear wording of the Swedish EAW Act that categorically states that surrender should be refused in such cases. For the majority, the question whether O.O.'s right to a fair trial has been violated simply does not arise. The Supreme Court justified the priority given to the mandatory requirement of the Swedish EAW Act by stating that framework decisions did not have direct effect and an 'interpretation' of EU law *contra legem* was not required. This justification can however be questioned as the principle established in *X* arises precisely in the context of the application of a framework decision.

[89] Göta Court of Appeal, decision of 7.6.2022 in case no. B 2077-22

[90] *Greek in ab.*, para. 31

[91] Case C 665/20 PPU *X 'European arrest warrant (ne bis in idem)'*, judgment of 29.4.2021, EU:C:2021:339

The two dissenting justices of the Supreme Court (out of five deciding the case) were of the opinion that the facultative grounds for refusal in the framework decisions had to be interpreted in such a way as to leave room for granting a request for surrender if, having regard to all circumstances of the case, the defence rights of the person sentenced *in absentia* has nonetheless been guaranteed in a satisfactory way. As regard to the mandatory character of the Swedish text, the minority argued that if to interpret the clear wording of the Swedish text requiring only that the issuing authority simply *stated* that the conditions in Art. 4a of the FD-EAW were fulfilled was not *contra legem*, so neither would an interpretation be *contra legem* that permits surrender in some exceptional cases. A teleologic interpretation of the Swedish text in conformity with EU law would then, according to the minority, enable surrender despite the non-fulfilment of conditions set out in Art. 4a of the FD-EAW. In the case at hand, the minority determined that the factual circumstances of the case, taken as a whole, suggested that O.O.'s defence rights had been adequately guaranteed.

As it is the ruling of the majority that has value as precedent, the current status of law can be summarized thus: (1) the executing authority in Sweden must examine the facts behind the confirmation given by the authority in the issuing Member State when determining whether a request for surrender shall be granted and (2) the request must be refused if (and only if) the conditions stated in Art. 4a of the FD-EAW are not met. This position can however be questioned, from the point of view of EU law, as discussed earlier in this report and more recently in the dissenting opinion of the minority in *Greek in absentia judgment* In order for the current position in Swedish law to change, a legislative amendment can be made, or a request for a preliminary ruling from the CJEU be made in the course of the ongoing appeals concerning the same or similar questions.

Section III – Mutual Trust and cooperation through the EAW: key interpretation and implementation challenges, and solutions adopted in Sweden

The Swedish Government was a strong supporter of the concept of mutual recognition and was positive towards the adoption of the FD-EAW even before the dramatic turn of event of September 2001 that hastened the negotiation process. The motive behind the preference for mutual recognition as a principle for in criminal matters was the possibility to enable effective cooperation between Member States without having to engage in the cumbersome process of harmonization of substantive criminal law and the law of criminal procedure. Cooperation in criminal matters between the Member States within the area of freedom, security and justice, which would soon encompass ten new Member States is meant to be a counterbalance to the criminality, which was to a great extent the result of the free movement afforded in this area. Mutual recognition was seen as a pragmatic solution to practical problems without any particular thought about mutual trust as a metaphysical concept that later would turn out to be a principle of great significance for the application of the principle of recognition. For the sake of a pragmatic solution Sweden was prepared to accept a system that was simple and efficient with a minimum of checks and verifications of the legal conclusions reached by judicial authorities in the Member States, e.g. that probable cause exists for someone having committed a crime or that the judgment of a court is correct even if, for instance, different rules of evidence are applied in different Member States. The preference for simplicity and efficiency meant that Sweden had chosen not to avail of many of the optional grounds for non-execution permitted under FD-EAW, rendering the surrender procedure applicable to the greatest extent.

This logic was carried through to the process of transposition into Swedish law. The legislative technique of requiring an express exception in the transposing statute (i.e. the EAW Act) for non-execution simplifies the application of the system. For instance, there is an explicit rule in the EAW rule that the court can point to when refusing to execute an incoming European arrest warrant that is so deficient in form and content to make a determination is impossible, or when the international law on privileges and immunity is applicable, without having to resort to reasoning based on general principles. One Trojan horse introduced in the EAW Act is the provision that execution of a European arrest warrant shall not be granted if that would constitute a breach of the ECHR. Thus, although non-execution is based on the EWA Act, the court's reasoning necessarily extends to cover sources external to the Act. It was also discussed in Section II above whether it is compatible with EU law post-*Melloni* to have a mandatory rule for non-execution by reference to the ECHR (rather than, e.g., a reason to postpone a decision on surrender).

To make the application of the EAW Act efficient and uniform, the grounds in the EAW Act for non-execution of a European arrest warrant are mandatory. As discussed in Section II of this country report, this way of transposing the optional grounds of non-execution according to FD-EAW is likely to be in conflict with EU law. It was submitted in that Section that a legislative amendment might be in order; but in the absence of an amendment, the courts might still grant surrender despite the mandatory nature of the Swedish legislation, if doing so would give effect to EU law. The 2022 decision of the Supreme Court in *Greek in absentia judgment* has established a precedent confirming the mandatory character of the grounds for refusal, now to be followed courts and other judicial authorities in Sweden but it is still unclear whether this position is compatible with EU law. A request for a preliminary ruling by the CJEU would provide an answer.

Problems of having the public prosecutor to function as the issuing judicial authority were discussed in Section I of the country report, in particular the question of proportionality. The Swedish order has been examined by the CJEU and that Court has concluded that sufficient protection has been afforded to the individual when the European arrest warrant is based on a court's decision on the question of deprivation of liberty and the proportionality of issuing a European arrest warrant has been taken into account of in the decision on the order to remand a suspect into custody. This discussion in Section I shows, however, that it is not always realistic to expect a court to also make an assessment on the proportionality of the issuance of a European arrest warrant. In any case, there is no statutory requirement for the courts to make such an assessment. A special problem with a custody order made *in absentia* is that it is valid according to Swedish law indefinitely. Review of the custody order is required only after the suspect has actually been apprehended, which means that a European arrest warrant issued on the basis of a domestic custody order can be outstanding for a considerable length of time, and this may restrict the freedom of movement of the suspect if it is not, strictly speaking, a deprivation of his or her liberty. To address these problems, arguably the need to interpret national law in conformity with EU law would mean that it will also be incumbent on the court to make a proportionality assessment when it is apparent that the domestic custody order will be used as a basis for a European arrest warrant, or at appeals, when it knows that the custody has in fact been used for the purpose of requesting a surrender.

When it comes to the execution of European arrest warrants for surrender from Sweden, the analysis of decisions of the Swedish Supreme Court shows that from the beginning the Court has adopted a surrender-friendly approach in which the principle of mutual recognition has been given such prominence that legal qualifications of the issuing judicial authorities are virtually accepted automatically. This situation changed shortly after the CJEU's judgment in *Aranyosi & Căldăraru*, when the pendulum swung and executing judicial authorities routinely refused execution of European arrest warrants on the basis of inhuman or degrading detention conditions. Having had the benefit of observing the development in the case law of the CJEU, the Supreme Court handed down a precedent stating that the prohibition of torture and inhuman or degrading treatment is an absolute right thus displacing the principle of mutual recognition from the weighing of different interests. In this precedent, the Supreme Court adopted the CJEU's two-step approach in Swedish law to determine real risks for inhuman or degrading treatment. However, instead of conducting its own analysis of the two-steps where the court should assess the situation in the individual case, the Supreme Court established that guarantees or assurances given by authorities of the issuing Member State should in principle be reliable. In this step, mutual recognition or mutual trust has substituted an actual fact-finding. It can be discussed whether this is compatible with EU law. But whatever the answer to this question is, some concerns have been raised that there is no system in place to follow up whether the guarantees or assurances have indeed been respected after the surrender. The decision of the Supreme Court in *Greek in absentia judgment* confirms the trend for greater attention paid to defence rights in that the Swedish court must now determine whether the issuing authority's confirmation that the sentenced persons rights have been resected is supported by fact, and that the requested enjoys an absolute right not to be surrendered after an *in absentia* judgment if the conditions set out in Art. 4a of the FD-EAW are not met.

The case law in Sweden shows that non-execution of a European arrest warrant on human rights grounds has only involved risk of violation of Art. 3 ECHR/Art. 4 CFR, even though arguments based on Articles 5, 6 and 8 ECHR have been raised in European arrest warrant proceedings in Sweden. It appears that under CJEU case law, violation of Art. 6 ECHR, in addition to Art. 3, is at least capable of being a reason for not granting a surrender request. Further precedent is needed from the Supreme Court and the CJEU on the relevance of

rights and freedom contained in the ECHR and CFR, other than those pertaining to torture, inhuman or degrading treatment, in connection with the non-execution of a European arrest warrant. In this regard, clarification is also welcome with respect to the impact of EU citizenship on provisions providing preferential treatment for nationals of an executing Member State.

So far, the Swedish courts have not made any request for preliminary rulings from the CJEU in cases concerning European arrest warrants. While this country report is not the place to discuss the reasons for the reluctance to request preliminary and the potential benefits of such requests, it should nonetheless state that this is the case in Sweden to see if this position is unique when compared with other Member States being studied.

As a final remark, a few words can be said on the function of mutual trust in the context of cooperation between the Member States. Mutual trust has been posited by the CJEU as some sort of a presumed transcendental entity from which practical obligations follow as a form of categorical imperative. This is quite different from the actual trust that is built on knowledge and actual experience. In the Swedish perspective these different kinds of trust can be seen as being represented by the system of the European arrest warrant as opposed to the system of the Nordic arrest warrant. Although both systems are based on the principle of mutual recognition, the different kinds of trust means that the the systems function differently despite of their apparent similarities. A deeper study of the concept of trust is necessary for a better understanding of the principle of mutual recognition.

REFERENCE LIST

EU instruments

- Charter of Fundamental Rights of the European Union, originally proclaimed on 7 December 2000, with revised text published in OJ C 202, 7 June 2016.
- Council (2002), Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18.7.2002.
- Council (2008), Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, OJ L 327, 5.12.2008.
- European Parliament and Council (2016), Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, OJ L 297, 4.11.2016.

EU case law

- Case C-399/11 *Melloni*, judgment of 26 February 2013, EU:C:2013:107
- Joined cases C-404/15 *Aranyosi* & C-659/15 PPU *Căldăraru*, judgment of 5 April 2016, EU:C:2016:198
- Case C-182/15 *Petruhhin*, judgment of 6 September 2016, EU:C:2016:630
- Case C-579/15 *Popławski*, judgment of 29 June 2017, EU:C:2017:503
- Case C-191/16 *Pisciotti*, judgment of 10 April 2018, EU:C:2018:222
- Case C-108/16 PPU, *Dworzecki*, judgment of 24 May 2016, EU:C:2016:346
- Case C-452/16 PPU *Poltorak*, judgment of 10 November 2016, EU:C:2016:858
- Case C-247/17 *Raugevicius*, judgment of 13 November 2018, EU:C:2018:898
- Joined Cases C-508/18 & C-82/19 PPU *OG & PI* 'Public Prosecutors Offices in Lübeck and Zwickau', judgment of 27 May 2019, EU:C:2019:456
- Case C-128/18 *Dorobantu*, judgment of 15 October 2019, EU:C:2019:857
- Case C-216/18 PPU *LM* 'Minister of Justice and Equality (Deficiencies in the System of Justice)', judgment of 27.7.2018, EU:C:2018:586
- Case C-220/18 PPU *ML* 'Generalstaatsanwaltschaft (Conditions of detention in Hungary)', judgment of 25 July 2018, EU:C:2018:589
- Case C-897/19 PPU *I.N.* 'Ruska Federacija', judgment of 2 April 2020, EU:C:2020:262
- Case C-398/19 *BY* 'Generalstaatsanwaltschaft Berlin (Extradition to Ukraine)', judgment of 17 December 2020, EU:C:2020:1032
- Case C-625/19 *XD* 'Openbaar Ministerie (Public Prosecutor's Office, Sweden)', judgment of 12 December 2019, EUC:2019:1078

- Case C-354/20 PPU *L & P 'Openbaar Ministerie (Independence of the Issuing Judicial Authority)'*, judgment of 17.12.2020, EU:C:2020:1033
- Case C-665/20 PPU *X* '*European arrest warrant (ne bis in idem)*', judgment of 29.4.2021, EU:C:2021:339
- Joined Cases C-562/21 PPU and C-563/21 PPU, *X & Y 'Openbaar Ministerie (Tribunal established by law in the issuing Member State)'*, judgment of 22.2.2022, EU:C:2022:100

Case law of the European Court of Human Rights

- *Muršić v. Croatia*, application no. 7334/13, judgment (Grand Chamber) of 20 October 2016, CE:ECHR:2016:1020JUD000733413
- *Rezmiveş and others v. Romania*, application nos 61467/12, 39516/13, 48231/13 and 68191/13, judgment (4th section) of 25 April 2017, CE:ECHR:2017:0425JUD006146712

Swedish legislation

- Parliament » Freedom of the Press Act (1949:105) (*Tryckfrihetsförordningen*)
- Parliament » Fundamental Law on the Freedom of Expression (1991:1469) (*Yttrandefrihetsgrundlagen*)
- Parliament » Criminal Code (1962:700) (*brottsbalken*)
- Parliament » Act (2003:1156) on the surrender from Sweden pursuant to a European arrest warrant (*lagen om överlämnande från Sverige enligt en europeisk arresteringsorder*)
- Government » Ordinance (2003:1178) on the surrender to Sweden pursuant to a European arrest warrant (*förordningen om överlämnande från Sverige enligt en europeisk arresteringsorder*)
- Government » Ordinance (2016:1142) amending Ordinance 2003:1178
- Prosecution Authority » ÅFS 2007:12 Regulation on international cooperation (*Åklagarmyndighetens föreskrifter om internationellt samarbete*)
- Prosecution Authority » ÅFS 2018:4 Regulation amending Regulation 2007:12

Swedish *travaux préparatoires*

- Swedish Government (2003), Government Bill prop. 2003/04:7 of 25.9.2003 Lag om överlämnande från Sverige enligt en europeisk arresteringsorder

Swedish case law

Supreme Court

- NJA 2005 s. 897, decision of 22.12.2005 in case Ö 4502-05
- NJA 2007 s. 168, decision of 21.3.2007 in case Ö 430-07
- NJA 2009 s. 350, decision of 10.6.2009 in case Ö 5407-08
- NJA 2012 not 10, decision of 23.4.2012 in case Ö 1476-12
- NJA 2015 s. 261, decision of 11.5.2015 in case Ö 5880-14

- NJA 2015 s. 1053, judgment of 22.12.2015 in case T 2177-14
- NJA 2020 s. 430, *Den rumänska arresteringsordern* (The Romanian arrest warrant), decision of 8.4.2020 in case Ö 6598-19
- NJA 2022 s. ____ (not yet reported), *Den grekiska utevarodomen* (Greek *in absentia* judgment), decision of 13.12.2022 in case B 4080-22

Supreme Court: Leave to appeal and other decisions

- Supreme Court (2.12.2015), decision of 2.12.2015 to grant leave to appeal (enforcement of sentence after trial *in absentia*) in case Ö 5549-15
- Supreme Court (22.11.2016), decision of 22.11.2016 (to refer the case back to the district court after clarification of the law by the issuing judicial authority) in case Ö 277-16
- Supreme Court (31.3.2020), decision of 31.3.2020 to grant leave to appeal (enforcement of sentence after trial *in absentia*) in case Ö 1503-20
- Supreme Court (27.5.2021), decision of 27.5.2021 on removal of the case (after withdrawal of the European arrest by the issuing judicial authority) in case Ö 2910-21
- Supreme Court (22.7.2021), decision of 22.7.2021 to grant leave to appeal (enforcement of sentence after trial *in absentia*) in case Ö 4183-21
- Supreme Court (14.12.2022), decision of 14.12.2022 to grant leave to appeal (enforcement of sentence after trial *in absentia*) in case Ö 6936-22

Other Swedish courts

- Södertörn District Court (22.10.2021), decision of 22.10.2021 granting surrender to Poland for the purpose of enforcement of sentence in case B 17483-21
- Göteborg District Court (10.11.2021), decision of 10.11.2021 granting surrender to Poland for the purpose of enforcement of sentence in case B 16629-21
- Göteborg District Court (25.3.2022), decision of 25.3.2022 granting surrender to Poland for the purpose of enforcement of sentence in case B 4348-22
- Jönköping District Court (11.5.2022), decision of 11.5.2022 refusing surrender to Greece for the purpose of enforcement of sentence in case B 1611-22
- Göta Court of Appeal (7.6.2022), decision of 7.6.2022 granting surrender to Greece for the purpose of enforcement of sentence in case B 2077-22

Sources of law from other jurisdiction

- [2012] UKSC 22, *Assange v Swedish Prosecution Authority (Nos 1&2)*, Judgment of the Supreme Court of 30 May 2012, [2012] 2 AC 471

Bibliography

- Bennet, Tova | "Chapter 8: Criminal Law", *Swedish Legal System*, 2nd edn, M. Bogdan & C. Wong (eds), Stockholm: Norstedts 2022, 144–212
- European Commission | *Handbook on how to issue and execute a European arrest warrant*, published in OJ C 335, 6.10.2017, 1–83
- Friman, Håkan, Ulf Wallentheim & Joakim Zetterstedt | *Överlämnande enligt en europeisk eller nordisk arresteringsorder – En kommentar*, Stockholm: Norstedts, digital version 3.12.2021
- Wong, Christoffer | "Chapter 9: Criminal Procedure", *Swedish Legal System*, 2nd edn, M. Bogdan & C. Wong (eds), Stockholm: Norstedts 2022, 186–212
- Wong, Christoffer | "Chapter 6: Surrender in accordance with a European arrest warrant", in I. Cameron, M. Thunberg Schunke, K. Påle-Bartes, C. Wong & P. Asp, *International Criminal Law from a Swedish Perspective*, Cambridge/Antwerpen/Portland: Intersentia 2011, 197–240